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No. 74

In the Supreme Court of the United States

OCTOBER TERM 1936

AMERICAN TELEPHONE AND TELEGRAPH COMPANY ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, AND NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS

BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION

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BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION

STATEMENT

An adequate statement of the case appears in other briefs, and for this reason we have not included a general statement herein.

The outline of this brief follows generally the topical arrangement suggested by appellants in their Statement of Points (R. 600); and against propositions advanced in said statement, Federal Communications Commission presents the following:

ARGUMENT

I

THE ORIGINAL COST PROVISIONS OF THE UNIFORM SYSTEM OF ACCOUNTS FOR TELEPHONE COMPANIES, PRESCRIBED BY THE FEDERAL COMMUNICATIONS COMMISSION, ARE *Not* VOID

The Uniform System of Accounts assailed in this suit was established by the Federal Communications Commission under authority of Section 220 of the Communications Act of 1934, which is comparable with Section 20 of the Interstate Commerce Act.

The appellants, in the trial court, challenged the validity of the system of accounts on three general grounds; (1) Violation of their constitutional rights, (2) want of conformity to statutory authority, and (3) such unreasonable and arbitrary exercise of power as to transcend authority conferred.

Decisions of the Supreme Court clearly show the powers exercised by the court in deciding issues founded upon the three grounds above stated.

In *Interstate Commerce Commission* v. *Illinois Central Railroad Co.*, 215 U. S. 452, 470, which involved the amenability of the Illinois Central Railroad Company to an order of the Interstate Commerce Commission regulating the distribution of coal cars during periods of car shortages,

the court, after recognizing the grounds for judicial interference, said:

> Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised.

In *Norfolk and Western Railway Co.* v. *United States et al.*, 287 U. S. 134, on an appeal from a decree of a district court dismissing a petition to enjoin the enforcement of provisions of an order of the Interstate Commerce Commission which required the appellant to keep its accounts in accordance with the prescribed system of accounts applicable to issues therein raised, this court, among other things, said:

> The Commission's order is challenged as in excess of the statutory grant of power. The concession is made that Section 20 of the Act grants a discretion to prescribe a uniform system of accounts, the manner in which they shall be kept, and the forms thereof. The appellant, however, asserts that this discretion is limited by the pur-

> poses and ends for which such accounts are to be kept, as exhibited in other sections of the Act. * * * (*id.*, p. 138–9).
>
> * * * * *
>
> With great earnestness the appellant characterizes the order as in several aspects a denial of due process. It declares that by virtue of the Commission's mandate an unfair and improper rate base is fixed, and a capital asset properly to be taken into account for purposes of recapture is eliminated. But this is to ignore the fact that the order is one touching accounting merely; that before any rate base can be ascertained or any basis of recapture determined the carrier will be entitled to a full hearing as to what property shall be included; and not until the Commission excludes the assets in question from the calculation may the carrier assert the infliction of injury to its rights of property. * * * (*id.*, p. 141).
>
> * * * * *

In the same case in the lower court, reported in 52 F. (2d) 967, 970, the court said:

> * * * The Commission is vested by Congress with full power and authority to require reports from carriers and to prescribe the form of the accounts which they shall keep. * * * *What these forms shall be, and what items shall be allocated under particular subdivisions thereof, are obviously matters which must rest in the discretion of the commission; and the courts will not interfere with the exercise of that*

> *discretion, unless such exercise is so manifestly arbitrary and unreasonable as to transcend the commission's powers:* [Italics supplied.]

The Federal Communications Commission had authority to prescribe the Uniform System of Accounts, and the order promulgating the System is immune from annulment unless it be found to be so manifestly arbitrary and unreasonable as to transcend the powers of the Commission—and, not then, unless it injuriously affects property rights.

This statement is well supported in cases heretofore cited, furthermore:

In *Kansas City Southern Railway Co.* v. *United States et al.*, 231 U. S. 423, counsel for said railway company made all the objections against the order involved there that are made in the case at bar. Mr. Justice Pitney, speaking for the court, began the statement of the case as follows (p. 437):

> The contention of appellant in the Commerce Court and in this court is that the regulations of the Interstate Commerce Commission relative to the method of keeping the accounts of common carriers, so far as they are here questioned, are unreasonable, beyond the power or authority of either Congress or the Commission, and violative of the Fifth Article of Amendments to the Constitution of the United States, as being a deprivation of property without due process of law. * * *

The following matter appears in the course of the opinion (*id.*, p. 441):

> * * * There is no direct interference with the internal affairs of the corporation; and if any such interference indirectly results, it is only such as is incidental to the lawful control of the carrier by the Federal authority and to this the rights of stockholders and bondholders alike are necessarily subject.

The court, discussing another feature of the case, said (*id.*, p. 449–50):

> It is insisted that if the appellant, having expended in round figures $600,000, secured by the sale of bonds for improvements, can be compelled to charge $400,000 of that amount to the operating expense of one year or to distribute it among the operating expenses of a series of years, and if it be forbidden to keep any other record representing the transaction, it will have in its possession no kind of record from which it can report accurately either the cost of its property or the cost of improvements or its operating expenses. This, we think, is a misapprehension of the effect of the regulations. They do not require appellant to falsify its books or to change in any way the evidential character of the original entries. The source of the money, and the disposition made of it as expended, may and should be correctly shown. The regulations do require that the contemporaneous abandon-

> ment of other property be likewise shown, and the replacement cost, less salvage, charged to the appropriate accounts under operating expenses. This, if observed, of course results in enforcing a prescribed distinction between capital expense and operating expense. It does not require that the record of the expenditure be obliterated; but it does of course affect the results as they work out upon the balance sheet. * * *

Continuing, the court also said (*id.*, p. 456–7):

> It is further insisted that even the theory upon which the accounting regulations rest does not, when analyzed, justify a charge of abandoned property to operating expenses, but at most a charge to profit and loss. The suggestion apparently has force; but, upon consideration, we are unable to see that it furnishes ground for judicial interference with the course pursued by the Commission. * * *
>
> But, did we agree with appellant that the abandonments ought to be charged to surplus or to profit and loss, rather than to operating expenses, we still should not deem this a sufficient ground to declare that the Commission had abused its power. So long as it acts fairly and reasonably within the grant of power constitutionally conferred by Congress, its orders are not open to judicial review.

In *Chesapeake and Ohio Railway Company* v. *United States et al.*, 5 F. Supp. 7, a three-judge

case, Eastern District, Virginia, the court held (5th syllabus):

> Accounting methods prescribed by Interstate Commerce Commission for rail carriers cannot be interfered with by court except on showing that they are so entirely opposed to fundamental principles of correct accounting as to manifest abuse of power. (Interstate Commerce Act, Section 21 (1, 5), as amended, 49 U. S. C. A. Section 21 (1, 5).)

The act of prescribing a system of accounts is legislative; and the courts have only limited authority, if any, to enjoin a system of accounts.

The extent of judicial review of an act within legislative range is well described in *St. Joseph Stock Yards Company* v. *United States and the Secretary of Agriculture,* decided by the Supreme Court on April 27, 1936, 298 U. S. 38, 51, wherein the court said:

> * * * The court does not sit as a board of revision to substitute its judgment for that of the legislature or its agents as to matters within the province of either. *San Diego Land & Town Co.* v. *Jasper,* 189 U. S. 439, 446; *Minnesota Rate Cases,* 230 U. S. 352, 433; *Los Angeles Gas Co.* v. *Railroad Commission,* 289 U. S. 287, 304. When the legislature itself acts within the broad field of legislative discretion, its determinations are conclusive. When the legislature appoints an agent to act within that sphere of legislative authority, it may endow the

> agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily.

The limited authority of the courts in a suit to enjoin a commission order is very well illustrated in *Lehigh Valley R. Co.* v. *United States,* 234 Fed. 682, affirmed in 243 U. S. 412. The court, addressing itself to the question present, and speaking of the Interstate Commerce Commission in connection with its order there under consideration, said (p. 697):

> * * * its right to judge depends on the statute, and the statute in terms gives it the right to inquire and determine whether a given situation presents a case * * *. In spite of the statutory declaration of finality, the courts still retain a limited power of supervision—enough to see that constitutional requirements have been observed. * * *

The limited power there mentioned describes the authority of the court in the suit under consideration.

The same idea is fully expressed in *Chicago & Grand Trunk Railway Company* v. *Wellman,* 143 U. S. 339, 344–5, wherein Mr. Justice Brewer, speaking for the court, said:

> * * * The theory upon which, apparently, this suit was brought is that parties

> have an appeal from the legislature to the courts; and that the latter are given an immediate and general supervision of the constitutionality of the acts of the former. Such is not true. Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties determine whether the act be constitutional or not; *but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals.* * * * [Italics supplied.]

The pertinent provisions of the Urgent Deficiencies Appropriations Act (28 U. S. C., Sec. 43–8; 38 Stat., Chap. 32, pp. 219–20), under which the suit was tried, indicate that said Act establishes no new remedy for testing the validity of orders of commissions.

The purpose of the Act mentioned appears to be to define more clearly the manner in which the Federal Equity Courts shall exercise powers vested in them under the Constitution and laws of the United States. The aforesaid Act does not enable said courts to apply any remedy, nor to grant any

relief, different from that previously authorized in any ordinary Equity proceeding in such courts.

In *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire,* 219 U. S. 549, 569, it was said:

> * * * The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy.* Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.

In *Borden's Farm Products Company, Inc.* v. *Baldwin,* 293 U. S. 194, 209, the court said:

> When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary.

The presumption mentioned is as applicable to administrative orders as to strictly legislative

enactments. See *Pacific States Box & Basket Company* v. *White, et al.*, 296 U. S. 176, 185.

The statement of the trial court respecting the *original cost* provisions of the Uniform System of Accounts is clear and concise. We could not improve the statement. Argument to sustain it inheres in it. No amplification is needed. That court, among other things, said (R. 566):

> The requirement that original cost be set forth in accounting records of the telephone companies serves to complete the picture of value in revealing the property's financial background and showing the relationship of a carrier's monetary return to the original as well as to its own investment. It aids the Commission in its duty to determine from all the pertinent circumstances and factors, the just and reasonable rates which the carrier may exact from its service. Original cost is a relevant factor. *Smyth* v. *Ames*, 169 U. S. 466, 547; *Los Angeles Co.* v. *R. R. Comm.*, 289 U. S. 287, 306, cf. Sec. 213 (a) of the Act. The object of the system of accounts might well be to display the pertinent financial operation and throw light upon its present condition. *Kansas City Southern Ry.* v. *U. S., supra*, at p. 440. Original cost as a segregated item on a balance sheet may serve to reveal actualities which may be pertinent in fixing a rate base on the capitalized earning power of a property purchased. In making readily available facts which tend to expose discrepancies

> in valuation, it cannot be said the system is so arbitrary as to be beyond the Commission's power. Forty-seven state public utility bodies acquiesce in the proposed requirements. This is not evidence of unreasonableness.

The reasons underlying the *original cost* provisions of the Uniform System of Accounts under stay were clearly and concisely stated by Mr. W. J. Norfleet, Chief Accountant of the Federal Communications Commission, in his affidavit. See quotation on p. 32 of this brief, and for same matter see R. 470, last paragraph.

For findings and conclusions sustaining generally the defense of the Federal Communications Commission, appellee herein, see "Findings of Fact", I to XXI (R. 573–8), and "Conclusions of Law", I to XV (R. 578–83).

For testimony on behalf of the Federal Communications Commission, defendant below—appellee here, see affidavits of William J. Norfleet (R. 468–484); Robert S. Rains (R. 484–492–500); John H. Bickley (R. 500–523); Asel R. Colbert (R. 523–531); Malcolm F. Orton (R. 531–544); and Charles W. Smith (R. 544–552).

The District Court did *not* err in holding the original cost provisions valid.

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(a) THE ORIGINAL COST PROVISIONS DO *NOT* REQUIRE THE APPELLANTS TO KEEP THEIR PROPERTY INVESTMENT ACCOUNTS SO AS TO MISREPRESENT THEIR INVESTMENT IN PROPERTY

Appellants' telephone plants are either constructed by them, or are acquired by donation, purchase, consolidation, or merger.

If telephone plant is constructed by appellants, the following instruction in the Uniform System of Accounts, under stay pending this appeal (R. 109), enumerates the items of cost includible in their investment accounts:

> 22. *Cost of construction.*—(A) The cost of construction of property chargeable to the telephone plant accounts shall include the cost of labor, material and supplies, transportation, contract work, relief and pensions, protection, injuries and damages, privileges and permits, taxes, special machine service, interest during construction, insurance, construction services, and other analogous elements in connection with such work.

If telephone plant is donated to appellants, instruction 20 (B) of the Uniform System of Accounts (R. 107–8) provides:

> Telephone plant contributed to the company or constructed by it through expenditures of contributions of money or its equiv-

> alent shall be charged to the telephone plant accounts at its original cost (estimated if not known) and there shall be credited to the depreciation reserve and amortization reserve accounts the estimated amounts of the reserve requirements, if any, applicable to the plant. The difference between the amounts so includible in the telephone plant and the reserve accounts shall be credited to account 175, "Contributions of telephone plant."

If telephone plant is acquired by purchase, consolidation, or merger, instruction 21 (A) of the Uniform System of Accounts (R. 108) applies, to wit:

> When property in use in telephone service (note instruction 3–AA) is acquired, the amount of money actually paid (or the current money value of any consideration other than money exchanged) for the property (together with preliminary expenses incurred in connection with the acquisition) shall be charged to account 276, "Telephone plant acquired." (Note also account 139.)

Amounts are then determined with respect to the acquired property representing:

(1) Original cost of plant in service.

(2) Original cost of plant under construction.

(3) Original cost of property held for future telephone use.

(4) Depreciation and amortization applicable to the acquired property.

(5) Balance of purchase price.

The amount of item (1) is distributed among the telephone plant accounts, the total of which is included in the balance sheet in investment account 100.1, "Telephone plant in service" (R. 122–3).

The amounts of items (2) and (3) are included in the balance sheet in investment accounts 100.2, "Telephone plant under construction", and 100.3, "Property held for future telephone use", respectively (R. 123).

The amount of item (4) is included in the balance sheet in accounts 171, "Depreciation reserve", and 172, "Amortization reserve", as appropriate (R. 140).

The amount of item (5) is included in the balance sheet in investment account 100.4, "Telephone plant acquisition adjustment" (R. 123).

In paragraph (1), provision (B), under instruction 21 (R. 108), reference is made to telephone plant accounts and to items to be charged thereto. The list of telephone plant accounts is found in the Uniform System of Accounts at page 47 (R. 143), and are numbered 201 to 277.

The accounting prescribed by the aforesaid instruction 21 will result in showing in the accounts and records of carriers the following information with respect to property acquired from another utility:

1. The cost of the property to the accounting company.

2. The *original cost* (as defined in instruction 3 (S. 1) of the Uniform System of Accounts) of the telephone plant, governmental franchises, and other similar rights acquired.

3. The amounts of depreciation and amortization applicable to the property.

4. The *original cost* of telephone plant under construction at date of purchase.

5. The *original cost* of property held for future telephone use acquired in the transaction.

6. The difference between (a) the amount of item (1) and (b) the net amount of items (2) to (5), inclusive; segregated and shown separately in investment account 100.4, "Telephone plant acquisition adjustment." (See affidavit of Mr. W. J. Norfleet (R. 474–5).)

Instruction 21 of the system of accounts under stay pending this appeal (R. 108–9), and instruction 21 of the system heretofore and now in effect (R. 365–6), show that the accounts and records to be kept under this Commission's system for telephone plant purchased will disclose not only the essential information reflected in the accounts and records as kept under the present system, but will also make readily available the record of original cost of telephone plant in service at date of the balance sheet.

Furthermore, instruction 2 of the Uniform System of Accounts (R. 97), issued by the Federal

Communications Commission on June 19, 1935, provides:

> 2. *Records.*—(A) The company's records shall be kept with sufficient particularity to show fully the facts pertaining to all entries in these accounts. Where the full information is not recorded in the general books the entries therein shall be supported by other records in which the full details shall be shown and the general book entries shall contain sufficient reference to the detail records to permit ready identification. The detail records shall be filed in such manner as to be readily accessible for examination by representatives of this Commission.

The purpose of instruction 2 of the Uniform System of Accounts is to prevent concealment and misrepresentation, and under instruction 21 thereof all carriers subject to the Communications Act of 1934 are required to include in the balance sheet, as well as in the journals and other records of the companies, any cost representing the investment of the reporting company as distinguished from the *original cost* to the first owner or dedicator.

In this case, the appellants are much like the appellant in *Kansas City Southern Ry. Co.* v. *United States, et al.,* 231 U. S. 423, 449, where the court spoke of appellant's "misapprehension of the effect of the regulations," and further said of the regulations:

> * * * They do not require appellant to falsify its books or to change in any way the evidential character of the original entries. * * *

In reading a balance sheet, or the accounts of a company, to determine the facts concerning a particular item, several accounts must often be combined. A separation of the accounts, for the purpose of more accurately indicating the character of the items included therein, is not only reasonable, but is essential, and does not in any way impair the integrity of the balance sheet showing. The mere matter of increasing or decreasing the number of balance sheet accounts may not turn on legal grounds.

Amounts included in account 100.4, "Telephone plant acquisition adjustment", may represent, under differing circumstances, a portion of the amounts paid for various and sundry tangible and intangible items. However, these amounts do not, as implied by appellants and additional appellants, represent, in all instances, a portion of the carrier's investment in physical properties or in franchises, patent rights, and similar intangible rights acquired, the original costs of which are includible in the telephone plant accounts. Some amounts included in account 100.4 should not, in all instances and without variation, be subject to depreciation or amortization accounting. Such amounts may be (but admittedly not always are)

the result of watering, writing-up, or unwarranted elimination of competition. If these amounts, necessarily subject to scrutiny, can be set out separately without violation of any essential accounting principle (and they can be), the regulatory body in the exercise of due diligence should require such appropriate segregation.

In *Norfolk & Western Railway Company* v. *United States,* 287 U. S. 134, 141, the court said:

> * * * Whether the Commission should make special classifications to fit exceptional cases lies within the discretion conferred, and courts ought not to be called upon to interfere with or correct alleged errors with respect to accounting practice. * * *

The presence of an item in investment account 100.4, "Telephone plant acquisition adjustment", does not cause the accounts to misrepresent appellants' investment in property. Creation of said account 100.4 is in no way unfair or misleading, nor does it present a false picture. The absence of a separate balance sheet account in which to include these important items of public concern would necessitate the continuance of the present undesirable practice of including such items in telephone plant account 278, "Undistributed cost of property" (R. 404), which account does not appear in the balance sheet. The balance in account 278 is combined with the balances in all other telephone plant accounts under the present system,

the total of which appears in the balance sheet in one account, to wit: account 100, "Telephone plant" (R. 378).

Throughout the briefs of both appellants and additional appellants a patent effort has been made to stigmatize account 100.4, "Telephone plant acquisition adjustment", by repeated statements and implications that the account represents merely a deferred charge against surplus or a suspense account, while at page 17 additional appellants argue that the mere title of the account casts a cloud of suspicion on the items, the costs of which are includible therein.

With respect to the first contention, we submit that notwithstanding the statements of appellants, account 100.4 speaks for itself. It appears as the fourth item in the balance-sheet statement (R. 121) and is grouped with nine other accounts under the heading, "I. Investments."

The title of each account of the system (including account 100.4) is followed by the text of the account showing the nature of the items includible therein. In many instances the text of the account is followed by a list of representative items further to assist the reader. A complete system of instructions, definitions, and texts, supporting the titles of the accounts, supplemented by illustrative lists of items, preclude a just charge of misrepresentation or deceit.

With respect to account 100.4, which is derived from account 276, we bring to the attention of the court provision (B), stated below that account (R. 123–4), viz:

> This account shall be subdivided according to the character of the amounts contained therein. In addition to a copy of the journal entry recorded to open the account, the company shall file with this Commission statements showing the basis of the computation of amounts included therein. The detailed records supporting these statements shall be retained permanently by the company.

The requirements of said provision (B) very clearly and completely contradict the contention made by the appellants that any part of the cost of acquiring property which is included in account 276 (R. 157) could be concealed by segregating charges in that account into six parts and including these separate parts in the balance sheet in accounts 100.1, 100.2, 100.3, 100.4 (R. 122–3) and accounts 171 and 172 (R. 140).

In re invalidity of account 100.1 and account 100.4—the latter particularly—when account 276 is wholly ignored, it should be noticed that in *Norfolk and Western Railway Company* v. *United States et al.*, 287 U. S. 134, 142–3, it was said:

> * * * The objection now under consideration asserts merely that the company is lawfully entitled to maintain a reason-

> able system of accounting. But there is no right to a particular form of accounting as such. * * *

The appellants at pages 32 and 33 of their brief and the additional appellants at pages 18 and 19 of their brief contend that there are great differences in principle and effect between the functions of account 100.4, "Telephone plant acquisition adjustment", of this Commission's system and account 278, "Undistributed cost of property", in the system prescribed by the Interstate Commerce Commission.

A comparison of instruction 21 of this Commission's system with instruction 21 of the present system, from which instructions accounts 100.4 and 278, respectively, are derived, clearly refutes the statements of appellants on these points.

The outstanding differences between the two instructions are that under this Commission's system the *original cost* of telephone plant acquired is recorded in the telephone plant accounts, whereas under the system now in effect amounts representing *current value, current cost new, original cost,* and *residual value,* are recorded in the telephone plant accounts; and that under this Commission's system, the difference between (a) the cost to the accounting company and (b) the net of the amounts recorded in the telephone plant accounts, 100.2, "Telephone plant under construction", 100.3, "Property held for future telephone

use", and the depreciation and amortization reserve accounts, is separately shown in the balance sheet in investment account 100.4, "Telephone plant acquisition adjustment" (R. 123), whereas the residual element, under the system now in effect, is included in telephone plant account 278, "Undistributed cost of property" (R. 404), and buried in the balance sheet in the total of account 100, "Telephone plant" (R. 378). On this subject, Mr. W. J. Norfleet said (R. 473):

> In my opinion Account 278, "Undistributed cost of property", is improperly classified in the present system of accounts as a telephone plant account. It is more appropriately includible as a separate balance sheet account. In many ways it performs the same function as Account 100.4, "Telephone plant acquisition adjustment", prescribed in this Commission's system.

The similarity between accounts 100.4 and 278 was recognized by the lower court in its opinion. See quotation on page 51 of this brief and for the same matter see R. 568, last paragraph.

The Uniform System of Accounts under consideration is clearly distinguishable from the system of accounts prescribed by the Public Service Commission in the State of New York, which was held invalid in *New York Edison Company, et al.* v. *Maltbie, et al.*, 244 A. D. (N. Y.) 685, affirmed 271 N. Y. 103.

The difference between (a) the cost to the accounting company of plant acquired from another

public utility and (b) its original cost at time of first dedication to public service (less depreciation applicable at date of acquisition) is, under this Commission's system of accounts, included in *investment* account 100.4, "Telephone plant acquisition adjustment" (R. 123), whereas the system held invalid in the *New York Edison* case required that this residual element be included in a *deferred debit* account styled "143. Suspense to be amortized." See *New York Edison Company* v. *Maltbie, et al.*, 244 A. D. (N. Y.) 685.

Under this Commission's system the residual element included in account 100.4 shall, in accordance with provision (C) under that account, be "disposed of, written off, or provision shall be made for the amortization thereof in such manner as this Commission may direct", depending upon the facts and circumstances surrounding the particular acquisition. Under the New York Public Service Commisison's system, this residual element "shall be written off over such period and in such manner as the Commission [N. Y.] may by order prescribe."

These distinguishing features were clearly recognized by the trial court in its opinion, quoted at p. 51 of this brief; and for the same matter see R. 568, last paragraph, where the court said:

> * * * This flexibility distinguishes the system at bar from that held invalid in New York Edison Co. v. Maltbie (244 A. D. (N. Y.) 685), * * *

See testimony of affiants (1) William J. Norfleet (R. 470–475, figures 1–20, R. 479–480, figures 34, 35, and R. 483, figures 1, 2); (2) Robert S. Rains (R. 486–488, figures 1–8, and R. 491, 492, figure 24); (3) John H. Bickley (R. 504–508, R. 510, letter c, R. 514–516, figures 1–5, R. 517, 518, figures 7 and 8, and R. 519–520, figures 11–15); (4) Asel R. Colbert (R. 525–527); (5) Malcolm F. Orton (R. 534–535, letters A–C, R. 540–542, and R. 543–544); and (6) Charles W. Smith (R. 547–548, letters A–B).

(b) THE ORIGINAL COST PROVISIONS DO *NOT* PREVENT THE APPELLANTS FROM CHARGING ANY DEPRECIATION EXPENSE ON A PART OF THEIR ACTUAL INVESTMENT IN DEPRECIABLE PROPERTY

This subject is related to our proposition II, and is hereinafter discussed thereunder. See p. 42, post.

(c) THE ORIGINAL COST PROVISIONS DO *NOT* REQUIRE, IN EFFECT, A RETROACTIVE CHANGE IN THE ACCOUNTS OF TRANSACTIONS ENTERED INTO BY APPELLANTS, WHETHER WITH OR WITHOUT GOVERNMENTAL APPROVAL

The system of accounts under attack was promulgated June 19, 1935, to become effective on January 1, 1936. It does not, as claimed by appellants, prescribe retroactive changes in the accounts. This is apparent from a reading of paragraph (D) of instruction 2 (R. 97–9) as follows:

> As of the effective date of this system of accounts, the several accounts prescribed herein shall be opened by transferring thereto the balances carried in the accounts previously maintained by the company. Copies of the journal entries recorded to effect these transfers shall be filed with this Commission. The company is authorized to make such subdivisions, reclassifications, or consolidations of such balances as are necessary to meet the requirements of this system of accounts.

This provision was carried over from the "First Revised Issue" promulgated by the Interstate Commerce Commission in 1933, except that the second sentence therein was added by this Commission. This provision does not appear to have been protested by any of the carriers when adopted by the Interstate Commerce Commission. It will be

remembered that it promulgated a system of accounts in 1913, which was revised in 1933. The original system, as well as the revised system, supplanted those which preceded, and were often changed.

The court will find by comparison of the form of balance sheet prescribed by the system under stay (R. 121) with that prescribed by the system now in effect under the stay (R. 376), that investment account 100, "Telephone plant", of the present system (R. 378) is abolished, and that four new investment accounts are prescribed, viz:

100.1 Telephone plant in service.

100.2 Telephone plant under construction.

100.3 Property held for future telephone use.

100.4 Telephone plant acquisition adjustment.

This means that the total amount in account 100 of the present system (R. 378), as of the effective date of the new system of accounts, shall be analyzed and then reclassified in the four new investment accounts as above numbered and named (R. 122–3).

It is evident from the above-mentioned provisions that the Uniform System of Accounts under consideration does not eliminate anything from the carrier's previous records. The new system merely requires, for prospective application and use, classifications different in some respects from classifications in the previous system. Such requirement is authorized under Section 220 (a) of

the Communications Act, and is valid. See *Interstate Commerce Commission* v. *Goodrich Transit Company,* 224 U. S. 194, and *Kansas City Southern Ry. Co.* v. *United States,* 231 U. S. 423.

The Interstate Commerce Commission and the State Commissions have, from the inception of accounting systems regulated by law, required certain classifications of accounts, and classification of items is the fundamental characteristic of the classification of accounts.

See testimony of affiants (1) William J. Norfleet (R. 479, figures 32 and 33); (2) Robert S. Rains (R. 490, figure 16); and (3) Malcolm F. Orton (R. 537, letter H).

(d) THE ORIGINAL COST PROVISIONS ARE *NOT* UNREASONABLY BURDENSOME AND EXPENSIVE, AND THEY *SERVE* A USEFUL PURPOSE IN ADDITION TO THE RECORDING OF INFORMATION WHICH COULD BE MADE AVAILABLE IN SUPPLEMENTARY STATEMENTS PURSUANT TO SECTION 213 (c) OF THE COMMUNICATIONS ACT OF 1934

Burdensomeness and expensiveness of performance under the provisions of the Uniform System of Accounts for Telephone Companies, prescribed by the Federal Communications Commission, are not proper subjects for the consideration of the court. Such questions are within the jurisdiction of the Commission alone. The Commission, however, has not acted arbitrarily, nor unreasonably, in the premises. On this point, see affidavit of Mr. W. J. Norfleet (R. 484).

In *United States, et al.,* v. *Missouri Pac. R. R. Co.,* 278 U. S. 269, 277–8, the court said:

> * * * *Inconvenience or hardships, if any, that result from following the statute as written must be relieved by legislation.* * * * [Italics supplied.]

In the court below, the plaintiffs contested the requirement for keeping a duplicate set of accounts, to some extent, during the first year of the application of the system. The contest on that point, we understand, has been abandoned; and there is here less expensiveness to discuss.

The telephone business has, in some quarters, been estimated to have assets exceeding five billion dollars—an amount said to be about one-fourth the value of all the railroads in the country. It is to be assumed that if there is to be effective regulation of the telephone carriers there necessarily must be reasonable expense therewith associated.

The reason underlying the *original cost* provisions of the Uniform System of Accounts under stay and the purposes served thereby were clearly and concisely stated by Mr. W. J. Norfleet in his affidavit, as follows (R. 470):

> * * * The reason for this requirement is the need for continuity and uniformity in accounting for the original cost regardless of the changes in ownership of the property or the incident of ownership at a given time, and to bring about uniformity in the statement of plant accounts of public utilities. Such continuity and uniformity are essential from the standpoint of charges to operating expenses for depreciation, from the standpoint of passing upon security issues, from the standpoint of considering the reasonableness of the purchase price of property to be acquired, and from the standpoint of valuation for rate-making purposes.

On this subject, Mr. Norfleet further testified as follows (R. 471–2):

> With respect to a minor part of telephone plant now in existence which was acquired

by the telephone company from other public utilities, the telephone companies have indulged in optional accounting with the result that certain property so acquired has been included in the plant accounts at "actual cost to the company", other property being recorded by a "merger of the book accounts", other property being recorded at the "current cost new", and still other property at "structural value."

* * * * *

Although the plant accounts are now stated as heretofore described, depreciation charges are computed on "book cost", and retirements are made on "average cost" or "original cost." The Commission's system of accounts corrects these inconsistencies in addition to providing information for the other purposes hereinbefore mentioned, in that it requires all items of telephone plant account to be stated on basis of "original cost" and that depreciation and retirements be computed on the same basis.

The appellants denounce the application of Section 220 (a) of the Communications Act of 1934 in such way as to require the inclusion in account 100.1 of the item of *original cost* as defined in the Uniform System of Accounts, because, as they say, a statement of such *original cost* may be had under Section 213 (c) of the Act; but, as the trial court said (R. 566):

* * * The powers conferred by Section 213 (c) are not restrictive of Section

220 (a) nor does the latter section restrict the former. The two sections are capable of complementary treatment.

Section 213 (c) provides in part:

> The Commission may at any time require any such carrier to file with the Commission a statement showing the original cost at the time of dedication to the public use of all or of any part of the property owned or used by said carrier. * * *

The gist of the foregoing is that the Federal Communications Commission *may at any time* call for the *statement showing the original cost* therein mentioned.

The mere possibility of performance under provisions above quoted from Section 213 (c) which the Commission may but is not obligated to apply, cannot be invoked by the carriers to defeat performance which the Commission may and does require under Section 220 (a); furthermore, Section 213 (c) assumes—at least contemplates—the possibility of an established system of accounts to which recourse may be had to obtain the *statement* which may be separately required under the aforesaid Section 213 (c), as it continues as follows:

> * * * For the showing of such original cost said property shall be classified, and the original cost shall be defined, in such manner as the Commission may prescribe; and if any part of such cost cannot be determined from accounting or other records,

> the portion of the property for which such cost cannot be determined shall be reported to the Commission; and, if the Commission shall so direct, the original cost thereof shall be estimated in such manner as the Commission may prescribe. * * *

As further indication that Congress did not intend that Section 220 (a) should be subservient to or superseded by Section 213 (c), we notice the following language of the latter section:

> * * * If the carrier owning the property at the time such original cost is reported shall have paid more or less than the original cost to acquire the same, the amount of such cost of acquisition, and any facts which the Commission may require in connection therewith, shall be reported with such original cost. * * *

The said Section 213 (c) further provides:

> * * * The report made by a carrier under this paragraph shall show the source or sources from which the original cost reported was obtained, and such other information as to the manner in which the report was prepared, as the Commission shall require.

By reference to the Communications Act of 1934, it will be seen that Section 213 falls under the subtitle "Valuation of Carrier Property", and no doubt every subdivision of said section from (a) to (h), inclusive, has some proper function to perform; and, with respect to the application of Sec-

tion 220 (a), at the same time we notice *Kansas City Southern Railway Company* v. *United States, et al.*, 231 U. S. 423, 443, as follows:

> * * * And since, * * *, uniformity in accounting is dependent upon the adoption and enforcement of precise classification, the authority to define the terms of the classification necessarily follows. It amounts, after all, to no more than laying down rules of action under which the Commission shall proceed, and leaving it to the Commission to apply those rules to particular situations and circumstances by the establishment and enforcement of administrative regulations.

Section 213 of the Communications Act is practically identical with Section 19 (a) of the Interstate Commerce Act as amended by the Emergency Railway Transportation Act of 1933.

Section 220 of the Communications Act is derived from Section 20 (5) to (8) of the Interstate Commerce Act.

In *Norfolk & Western Railway Co.* v. *United States, et al.*, 287 U. S. 134, 140–1, the court considered Sections 15 (a), 19 (a), and 20 of the Interstate Commerce Act, and allowed each Section full force and effect.

In *United States* v. *Atlanta B. & C. Ry. Co.*, 282 U. S. 522, 529, the court considered Section 20 (1) to (5) and Section 1 (20) of the Interstate Commerce Act, and allowed full force and effect to each.

In each of the cases cited, the Supreme Court sustained the accounting provisions of the law because such provisions appeared to be necessary in the administration of other provisions of the Act. In the aforesaid *Norfolk & Western* case, particularly, the court sustained an accounting order upon the requirement in the valuation section of the Interstate Commerce Act.

Section 220 (a) and (b) should be allowed to operate in aid of each other—in the light of each other, and in conjunction with Section 219 (a) and (b); and Section 220 (a) to (h) should be allowed to operate in the aid of Section 213 (a) to (h); and in connection therewith it should be noticed that the Federal Communications Commission has duties under Section 204 of the Act, and under Section 205 of the Act, which deal with hearings and orders in rate matters. For the aid of Sections 204 and 205, and to enable the Commission to proceed advisedly thereunder, many other sections should have full and complete application and enforcement.

In *United States* v. *Atlanta B. & C. R. Company, supra,* at p. 527, the court, discussing proceedings before the Interstate Commerce Commission, said:

> * * * Its functions are manifold in character. In some matters its duty is merely to investigate and to report facts. See *United States* v. *Los Angeles & Salt Lake R. Co.,* 273 U. S. 299, 310. In others, to make determinations. See *Great North-*

> *ern Ry. Co.* v. *United States,* 277 U. S. 172. In some, it acts in an advisory capacity. Compare *Minneapolis & St. Louis R. Co.* v. *Peoria & Pekin Union Ry. Co.,* 270 U. S. 580, 584–5. In others in a supervisory. * * *

It is beyond question that the *original cost* provisions of the Uniform System of Accounts, prescribed under Section 220 (a) of the Communications Act, serve useful purposes additional to that of any statement that might be required under Section 213 (c) of the Act.

The attention of the court is respectfully called to *Tri-State Telephone & Telegraph Company Proposed Control,* 180 I. C. C. 229, and to *Tri-State Telephone & Telegraph Company Control,* 193 I. C. C. 383.

The said cases comprised a matter where one of the Bell companies sought to acquire a telephone company at a price far in excess of its true value. The application was denied in the first instance, and, thereafter, the company made a proposal to make the purchase for a much smaller amount. The latter application was approved. The Commission stated, 193 I. C. C. 383, 384–5, that:

> This application * * * was denied on the sole ground that the price proposed to be paid was greatly in excess of the equity in the properties represented by the stock and was therefore not in the public interest * * *.

The appellants have complained of the difficulty of showing *original cost,* but eminent authorities are in disagreement with appellants. See "Railroad Finance and Organization", by William Z. Ripley, at pages 347–8:

> "Book value" or cost of property, as we have already seen, seldom represents anything even approximating to the facts. The meagreness of corporate records, either because of carelessness or bad faith, is indeed a severely practical objection; *and yet experience has already shown that original cost can be unearthed.* The most substantial attempt along this line is the inventory made by the Washington Railroad Commission in 1905. The actual investment was found to be obtainable for practically all of the property. * * * [Italics supplied.]

We see no reason why practical and satisfactory results cannot be obtained by an examination of the historical records of properties acquired by purchase, and by engineering and other studies. Difficulties encountered in determining such an important fact as *original cost* of property in public use do not justify continuation of an improper accounting procedure such as that now in effect. Cf. *Sharfman, The Interstate Commerce Commission,* Vol. III–A (1935), pp. 143, et seq.

The recording of items in the accounts, and particularly telephone plant accounts, on basis of estimates, is not an innovation in public utility ac-

counting, or in any accounting procedure for that matter. For example, the accounting regulations heretofore and now in effect governing the recording of telephone plant purchased (instruction 21), and which appellants have elected to use in many instances, provide that (R. 365–6):

> When property in use in telephone service is purchased, * * * there shall be charged as of the date of purchase: (1) To account 211, "Land", *the estimated current value* of the land; (2) to the depreciable plant accounts, the *current cost new* (*estimated if not known*), of the property classable therein; (3) to account 202, "Franchises", *the original cost* of all governmental franchises and similar rights acquired; and (4) to accounts 232, "Station installations", and 233, "Drop and block wires", such proportion of *the estimated current cost new, etc.* [Italics supplied.]

Incidentally, the accounting now performed by appellants for depreciation and for employees' pensions is almost exclusively based on estimates involving highly complicated actuarial computations.

The testimony of the Chief Accountant of the Federal Communications Commission, and of other accountants of experience and repute, shows that the order under attack in this case, and the accounts and instructions covered thereby, can be competently and fairly applied by the appellants, whether as classes or as individuals.

See testimony of affiants, (1) William J. Norfleet (R. 477–479, figures 26–31, and R. 484, figure 1); (2) Robert S. Rains (R. 489–490, figures 12–15); (3) John H. Bickley (R. 510, letter d); (4) Asel R. Colbert (R. 530); and (5) Malcolm F. Orton (R. 535, letter D, and R. 538, letter B.)

II

THE PROVISIONS OF TELEPHONE DIVISION ORDER NO. 7–C (PARAGRAPH (C) OF THE TEXT OF ACCOUNT 100.4, "TELEPHONE PLANT ACQUISITION ADJUSTMENT") THAT (R. 124): "THE AMOUNTS RECORDED IN THIS ACCOUNT WITH RESPECT TO EACH PROPERTY ACQUISITION SHALL BE DISPOSED OF, WRITTEN OFF, OR PROVISION SHALL BE MADE FOR THE AMORTIZATION THEREOF IN SUCH MANNER AS THIS COMMISSION MAY DIRECT" ARE *Not* VOID

The phrase "disposed of" is primarily defined by recognized lexicographers as meaning "arranged or set in order", and not as meaning "extinguished or annihilated" as intimated by appellants. An item in this account may be disposed of by allowing it to rest in the account until the property to which it is related is retired from service.

The points numbered I–b and II in the Statement of Points, upon which appellants rely in their appeal in this case, are so closely related (see p. 27, ante) that we have until now postponed discussion of proposition I–b to avoid repetition (notice, too, discussion of the *New York Edison* case, appearing in this brief, ante p. 24, et seq.).

The provisions of this Commission's system of accounts, now under attack, which would govern appellants' accounting for depreciation, are separate and distinct from the provisions governing the accounting for recording their investment in plant. It is, therefore, apparent that the original cost provisions neither prevent nor require the accounting for depreciation expense by the appellants.

The point which appellants apparently would make by their statement (I–b), is that account 100.4, "Telephone plant acquisition adjustment", in which is included a part of their investment, is not designated a depreciable account *as such* in this Commission's system.

This is not new in accounting, nor unique in the system under attack. There are other means of accounting for loss in service value of property than by charges to operating expenses for depreciation. Appellants are not now permitted, nor have they since 1913 been permitted to include in operating expenses, through charges for depreciation, the full purchase price of property.

Under the present system a part of appellants' investment in plant is now recorded in account 278, "Undistributed cost of property" (R. 404). Depreciation accounting is not permitted for property represented by amounts in this account, and the amounts recorded therein can be (and properly should be) extinguished only through surplus.

A part of appellants' investment is now recorded in accounts 202, "Franchises", and 203, "Patent rights" (R. 394). These investments are not now designated as depreciable, but provision is made for the amortization thereof in such manner as to produce the same result as would obtain under depreciation accounting.

A part of appellants' investment in plant is now recorded in accounts 232, "Station installations", and 233, "Drop and block wires" (R. 399). These properties depreciate just as any other depreciable property, but the accounts in which investment in such property is recorded are not designated as accounts covering classes of depreciable telephone plant (instruction 82, R. 376). Because of circumstances peculiar to such property, the full service loss is charged to operating expenses at time of retirement.

There were sound reasons for the Interstate Commerce Commission's accounting treatment of the foregoing properties, to wit: "Undistributed cost of property", "Franchises", "Patent rights", "Station installations", and "Drop and block wires", and for omitting such properties from the classes of depreciable telephone plant.

The Federal Communications Commission is authorized by Section 220 (b) of the Communications Act of 1934 to:

> * * * prescribe * * * the classes of property for which depreciation charges may be properly included under operating

> expenses, and * * * when it deems necessary, modify the classes * * * so prescribed. * * *

In exercising its authority in this respect, this Commission has prescribed certain classes of telephone plant named in instruction 82 (R. 120). There are sound reasons underlying the omission by this Commission of property represented by account 100.4, "Telephone plant acquisition adjustment" (R. 123), from the classes of depreciable property.

There are also sound reasons underlying provision (C) of the text of account 100.4, "Telephone plant acquisition adjustment", that (R. 124):

> The amounts recorded in this account with respect to each property acquisition shall be disposed of, written off, or provision shall be made for the amortization thereof in such manner as this Commission may direct.

The Commission might have followed the present system, by providing that the amounts recorded in account 100.4 should be extinguished only through surplus, or in the same manner as that part of appellants' investment now recorded in account 278, "Undistributed cost of property" (R. 404), can be disposed of. Such a provision would, in some instances, be unfair to appellants. Provisions might also have been made that all amounts recorded in account 100.4 should be extinguished only through charges to operating ex-

penses for depreciation thereof. Such a provision would be unfair to the subscribers in those instances involving capitalization of earning power, cost of elimination of competition, excessive payments to affiliates, and other costs not in the public interest. Provision might also have been made for distribution of the amounts recorded in account 100.4 equally between operating expenses and surplus, but this provision, or any other such provision, would, under some circumstances, be arbitrary and unreasonable.

In view of the foregoing, the Commission has recognized the necessity of ascertaining facts in each individual case before prescribing the final accounting to be performed in that case. It should be apparent that such provision is imperative in the interest of fairness to all parties and for purposes of maintaining uniformity in accounting procedure.

Furthermore, where the accounts of utilities of different sizes and different business practices and policies are to reflect the purchase of property from predecessor companies, and from affiliated companies, and such acquisitions are frequently made through the purchase or exchange of securities or properties, the issuance of individual orders requiring a particular carrier to make specific entries with respect to transactions as to which no inflexible specific accounting rules, regulations, or classifications can be nicely or precisely made un-

til the facts are known, is proper, orderly, and valid; and it is necessary, if the public regulation of public utilities is to be useful and successful. (See instruction 21 (C) (R. 109).)

As we have previously stated, amounts included in account 100.4, "Telephone plant acquisition adjustment", (R. 123) may represent, under differing circumstances, a portion of the amounts paid for various and sundry tangible and intangible items.

The Uniform System of Accounts contains general rules for the distribution of expenditures, according to their character, to investments, operating expenses, income, surplus, and other accounts. (See instruction 10, "Purpose of balance-sheet accounts" (R. 104); instruction 20, "Purpose of telephone plant accounts" (R. 107); instruction 30, "Purpose of income accounts" (R. 115); instruction 40, "Purpose of surplus accounts" (R. 116); instruction 50, "Purpose of operating revenue accounts" (R. 116); instruction 60, "Purpose of operating expense accounts" (R. 117); and instruction 70, "Purpose of clearing accounts" (R. 118).)

As stated by Mr. W. J. Norfleet in his affidavit (R. 476):

> Affiants for plaintiffs say that the amounts to be recorded in Account 100.4 must be extinguished either immediately or later at the pleasure of the Commission, and

> that such amounts are a deferred charge against surplus, since the Commission can make it such a charge at any time. This is purely speculative and unsupported by the system of accounts, the general rules of which govern the disposition of items not specifically provided for. *The affiants may just as well have made the proper assumption, namely, that the disposition of the amounts to be recorded in Account 100.4, "Telephone plant acquisition adjustment" would be disposed of, after the character of the item had been determined, in a manner consistent with the general rules underlying the uniform system of accounts for the distribution of expenditures, according to their character, to operating expenses, income, surplus, or remain an investment.* [Italics supplied.]

The court below likened amortization to depreciation (R. 569). There is support for such position. See Whitten on "Valuation of Public Service Corporations", 2d ed., section 853, wherein reference is made to the American Telephone and Telegraph Company as recommending the straight line method of depreciation. We quote the following (p. 1830):

> The function of depreciation reserve is to amortize the portion of the expense of conducting the business caused by using up this depreciable property.

The following statements authorized by the Executive Committee of the American Accounting Association appear in an article in the June 1936 issue of "The Accounting Review" (p. 188):

> 5. The application of these principles should be broad enough to cover amortization of fixed assets through allowances for depreciation, depletion, and obsolescence, and reductions of inventory and investment costs to amounts allocable to succeeding periods,
>
> * * * * *
>
> 10. The operations section of the income statement should disclose the gross revenues from sales made and services rendered; the elements of operating cost and expense incurred, including the amount of *depreciation and other amortization* of assets applicable; * * *. [Italics supplied.]

It is apparent from the foregoing that there is abundant authoritative support for treating depreciation as a class or type of amortization. All consumption, in operation, of costs incurred in the acquisition of property in use in telephone service is not necessarily recorded through "depreciation charges." The Commission may rightfully exclude from "depreciation expenses" and style as "amortization expenses", or by any other term found appropriate in the circumstances, amounts appearing in account 100.4 which it finds appellants entitled to recover as operating expenses.

For such recovery the Commission has made among other pertinent provisions the following:

> (1) In provision (B), under account 100.4, the rule that "this account shall be subdivided according to the character of the amounts contained therein" (R. 123);
>
> (2) The statement in instruction 60, that "the operating expense accounts are designed to show the expenses of furnishing telephone service" (R. 117); and
>
> (3) In provision (B), under account 172, "Amortization reserve", the provision that "it shall also be credited with any amounts which this Commission may authorize under a plan to amortize the balance in account 100.4, 'Telephone plant acquisition adjustment'" (R. 140).

Upon comparing the system of accounts under stay during the pendency of this appeal with the system of accounts heretofore and now in effect under the stay, the trial court, upon consideration of the original cost provisions of the new system, entered into a discussion of the objection of appellants that no depreciation is allowed on amounts charged to the "Telephone plant acquisition adjustment" account. Such discussion carries its own argument with it. The court said (R. 568–9):

> On a comparison of the two systems, that of this Commission seems to more accurately reflect the condition and record the history of the plant. Account 100.4 is listed among investments. It can be subdivided

so that there can be segregated any amount therein not representing (1) the cost of elimination of competition; (2) payment to an affiliate at a price in excess of cost to it with a profit returnable to the purchasing company in the form of dividends or otherwise; and (3) any other element not expended in public interest.

This segregated amount would receive the same treatment substantially in the rate and depreciation basis as would amounts appearing in 100.1, "Telephone plant in service." In this light, it appears that the proposed system merely provides segregation, and that the addition of the amounts in these investment accounts 100.1 through 100.4 would accurately picture the legitimate investments of the purchasing company.

To follow the plaintiffs in their argument that a reserve of surplus must be maintained against 100.4 and that this is fundamentally wrong, would be to ignore the similarity between 278 of the present system and 100.4 of the proposed system, and further it requires the assumption that the Commission will act improperly in the future under 100.4 (c). This cannot be presumed. The order provides for alternatives adaptable to the facts of individual cases. This flexibility distinguishes the system at bar from that held invalid in *New York Edison Co.* v. *Maltbie* (244 A. D. (N. Y.) 685). This cannot be held, before any order under 100.4

(c) has been made by the Commission, to be such an arbitrary method of accounting that the order imposing it is void.

The same argument applies to the objection that no depreciation is allowed against item 100.4 "acquisition adjustments." This complaint anticipates arbitrary action by the Commission, under 100.4 (c), which authorizes handling of this item through amortization. The effect would be the same as writing down through depreciation, and until the Commission acts so that the accounts become so contrary to the principles of correct accounting as to constitute the Commission's order arbitrary and unreasonable, the Commission is within its powers. The court need not agree the accounting proposed is the best method, but at this stage it cannot be said the provision is arbitrary. The objection is made that the Commission's refusal to act properly within 100.4 (c) would constitute a negative order, nonreviewable within the doctrine of *Procter & Gamble* v. *United States,* 225 U. S. 282. This would not cut off the plaintiff's right of attacking the system as it would apply to them after such a refusal. The appeal need not be on the order denying relief but can be against the system as its operation is affected by such denial.

There is no deprivation of property involved here. The Supreme Court has noted that the question merely concerned accounting and that there was no occasion to hold

> the order invalid as a deprivation of property until actual damage was threatened by it as in the use of an improper rate base in setting rates. *Norfolk & Western Ry. Co.* v. *United States,* 287 U. S. 134; *United States* v. *Los Angeles & Salt Lake R. R. Co.,* 273 U. S. 299.

In the last paragraph on page 15 of their brief additional appellants state:

> We are discussing the right of the Commission under the guise of prescribing "forms of account" to require these companies to write off from their books a loss which they have in fact not suffered.

This Commission has assumed no such right in the system of accounts under attack in this suit. The Commission has, and we believe rightfully so, reserved the right to require a company to write off from its books a loss *which they have in fact suffered.* This, we believe, is in the public interest *in order that the reader of the balance sheet may be correct in assuming that amounts paid for property which is no longer in existence are not included in the balance sheet as investment in telephone plant. This cannot be correctly assumed under the system heretofore and now in effect.*

There may be instances where the purchase price of property is represented by exorbitant amounts paid for the capital stock of the company whose property is acquired. Under such circumstances it would be fitting and proper that such portion of

that cost as does not represent value received should be written off to surplus. Furthermore, securities of the acquiring company are often exchanged for property, and valuations placed on such securities by the acquiring company may be excessive. Surely such excessive valuations should not be included in depreciable telephone plant accounts or otherwise shown in the balance-sheet statement as legitimate investments.

Under provision (C) stated below account 100.4, "Telephone plant acquisition adjustment" (R. 124), carriers are not compelled—in the light of the alternatives provided therein—to write off any amount in said account.

Provision (C) stated below account 100.4 is a statement directory in character setting forth means further to account for items included in said account and merely provides for alternate actions that may be found appropriate by the Commission in cases arising in the future. Without such future action, there will be no case or controversy subject to judicial review. Until then, said provision (C) will remain purely directory or advisory. Contrast *United States v. Atlanta B. & C. Ry. Co.* (1931), *supra,* with *Atlanta B. & C. Ry. Co.* v. *United States* (1935), 296 U. S. 33, wherein the Supreme Court distinguished between an accounting order which is subject to judicial review and an order, merely declaratory of rules, not subject to review.

All contention respecting the propriety of instructions, as distinguished from the validity of accounts, is therefore prematurely precipitated. The attempt to invalidate instructions or provisions in the nature of directions or instructions in the Uniform System of Accounts, at this time, is based upon no consummate right. It is without present foundation either in fact or law.

As the trial court said, the appellants have been done no actionable wrong until the Federal Communications Commission shall have made some arbitrary and unreasonable requirement with respect to disposition of amounts in investment account 100.4.

See testimony of affiants (1) William J. Norfleet (R. 476–477, figures 21–25, and R. 481–482, figures 1–4); (2) Robert S. Rains (R. 488–489, figures 9–10, and R. 490, figure 17); (3) John H. Bickley (R. 511–512, 516, figure 6, R. 518–519, figures 9–10, and R. 520–521, figures 16–17); (4) Asel R. Colbert (R. 527–528); (5) Malcolm F. Orton (R. 535–537, letters E–G); and (6) Charles W. Smith (R. 548–549, letters C–D, and R. 550).

The District Court did *not* err in holding said provisions valid.

III

Instruction 2 (B.1) of the Order Assailed by the Appellants Is *Not,* In Its Requirement, So Arbitrary and Unreasonable As To Be Beyond the Authority of the Federal Communications Commission to Prescribe, and It Does *Not* Deprive the Appellants of Their Rights Under the Due Process Clause of the Fifth Amendment to the Constitution of the United States

The aforesaid instruction is by its terms expressly applicable to *charges* to certain accounts, to wit: those *prescribed* for Telephone Plant, Income, Operating Revenues, and Operating Expenses. Such charges must be *just and reasonable* and any payments in excess of *just and reasonable charges* must be charged to another account, known as "Miscellaneous income charges" (R 163).

The Federal Communications Commission is authorized by the Communications Act of 1934, Section 220 (a), to prescribe the forms of accounts—to outline the formulas. Whether the method of formulating the accounts is reasonable or unreasonable, and whether the segregation of accounts out of some accounts into other accounts, is proper or improper, are questions of fact. (See *Groesbeck et al.* v. *Duluth, South Shore & Atlantic Rail-*

way Company, 250 U. S. 607; see particularly the concluding part of the opinion, at p. 614.) Questions of fact are for the Commission—not for the court.

The Act to Regulate Commerce (49 U. S. C., Chap. 1; 41 Stat. 474), in numerous sections, and in many ways, engages the phrase *just and reasonable,* and its opposite, *unjust and unreasonable,* to characterize things respectively required or prohibited by said Act. See Sections 1 (4), 1 (5), 1 (6), 1 (8), 1 (11), 1 (12), 1 (15) (b), 1 (16), 1 (17), 1 (21), 3 (1), 3 (4), 4, 5 (1), 5 (2), 10 (4), 15 (1), 15 (6), 15 (7). As illustrative of such use of said expressions, we notice Section 1 (5), as follows:

> All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be *just and reasonable,* and every *unjust and unreasonable* charge for such service or any part thereof is prohibited and declared to be unlawful. [Italics supplied.]

In the matter of the Investigation and Suspension of Advances in rates for the transportation of coal by the Chesapeake and Ohio Railway Company and other carriers, XXII I. C. C. 604, the justice and reasonableness of the rates was the sole question involved. On page 624 the Commission said:

> * * * The words "just and reasonsonable" imply the application of good

> judgment and fairness, of common sense and a sense of justice to a given condition of facts. * * *
>
> * * * A just and reasonable rate must be one which respects alike the carriers' deserts and the character of the traffic. * * *
>
> * * * There is, however, a zone within which we may properly exercise "the flexible limit of judgment which belongs to the power to fix rates." These are the words of the Chief Justice of the Supreme Court, 206 U. S. 26. * * *

Other cases on this subject to which the attention of the court is directed are *Pennsylvania Co.* v. *United States,* 236 U. S. 331, 361, and cases cited; *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.,* 168 U. S. 144, and cases cited; *Philadelphia & R. Ry. Co. et al.* v. *Interstate Commerce Commission,* 174 Fed. 687, 688; *Pennsylvania Railroad Company* v. *International Coal Mining Company,* 230 U. S. 184; *Standard Oil Company* v. *United States,* 221 U. S. 1; and *United States* v. *American Tobacco Company,* 221 U. S. 106.

The foregoing citations are ample to show that the idea of "just and reasonable" is old in public utility regulation. The gist of appellants' argument at pages 36 to 38 of their brief appears to be: (1) that instruction 2 (B. 1) requires the accounts to record what in someone's judgment should have been spent rather than what was spent;

(2) that since net operating income is one of the most vital items in the company's statements, outlays of money, being paid and non-recoverable, should enter into the computation of net operating income irrespective of whether or not they are reasonable or unreasonable, and (3) that, under the instruction, the accounting company acts at the peril of criminal prosecution in recording every item of outlay for property, wages, salaries, or other expenses.

With respect to the first contention, it should be noted that under instruction 2 (A) of the Uniform System of Accounts (R. 97), the appellants are required to keep records of sufficient particularity to show fully all the facts pertaining to all entries in the aforesaid Uniform System of Accounts. The sources of charges to Telephone Plant, Income, Operating Revenues and Operating Expenses under instruction 2 (B. 1) are found in the records to be kept under instruction 2 (A).

Instruction 2 (B. 1) does not impose upon appellants any incorrect or unsound method for making charges to accounts mentioned therein, nor does it postulate obedience to any indefinite or vague standard of conduct contemplated thereby.

Instruction 2 (B.1) deals primarily with charges, merely directing that they, to wit, charges, "shall be just and 'reasonable'," and secondarily with "payments by the company in excess of such just and reasonable charges." The instruction shows no intent to determine what payments shall be

made. It only deals with charges after payments are made.

Although it may be the duty of a bookkeeper to make entries in accordance with transactions, the officers and managers of a public utility have some responsibility to the public as well as to the company, and it is their duty under the law to see that all transactions are just and reasonable, not only to the company, but to the public.

While there may be a presumption that all transactions entered into by and between a public utility and another are reasonable and just, and while it may be that responsible accounting officers should record transactions as they occur, in this connection it must not be overlooked that, when accounting is made and reported, the Commission has a right to reject the accounting as made and to require something in lieu thereof. That, perhaps, is the reason why, in Section 220 (g) of the Act, reference is made to "keeping of accounts, records, and memoranda" prescribed, and then further reference is made to such accounts, records, and memoranda "as may be approved by the Commission." Upon the rejection of any report covering an account which the accounting officers considered prima facie to be just and reasonable, the Commission, under Section 220 (d) of the Act, would have a right to direct that the excess above just and reasonable charges should be charged to account 323, "Miscellaneous

"income charges" (R. 163); and it affords the Commission a better basis for requiring such transfer to have the specific demand in the first instance that all charges be just and reasonable.

In view of the foregoing, we see no merit in the second contention of appellants.

The appellants' third contention is hereinafter discussed at pages 63–66.

103991—36——5

(a) THE INSTRUCTION IS *NOT* CONTRARY TO THE FUNDAMENTAL PRINCIPLES OF CORRECT ACCOUNTING, AND IT WOULD *NOT* COMPEL A FALSIFICATION OF THE ACCOUNTS OF THE APPELLANTS

This statement is fully covered in the discussion of other propositions herein argued (see pp. 56–61 ante), and in addition thereto we bring to the attention of the court the following statement of Mr. W. J. Norfleet in his affidavit (R. 484):

> In my opinion and for the reasons heretofore mentioned, the requirements of this Commission's system of accounts are in no way contrary to fundamental principles of correct accounting but are, in fact, in conformity therewith and are neither arbitrary nor unreasonable.

See testimony of affiants (1) William J. Norfleet (R. 482–483, figures 1–2); (2) John H. Bickley (R. 513–514, and R. 522, figure 27); (3) Asel R. Colbert (R. 529); (4) Malcolm F. Orton (R. 539–540); and (5) Charles W. Smith (R. 551).

(b) THE INSTRUCTION DOES *NOT* LAY DOWN A RULE OF ACCOUNTING, TO WHICH APPELLANTS MUST CONFORM ON PAIN OF THE STATUTORY PENALTIES, SO VAGUE AND INDEFINITE AS NOT TO CONSTITUTE A LEGAL STANDARD OF CONDUCT

The decisions heretofore cited and previous comment abundantly refute appellants' contention that the aforesaid instruction lays down a rule of accounting so vague and indefinite as not to constitute a legal standard of conduct.

In support of their third contention (ante p. 59) that, under the aforesaid instruction, the accounting company must act at the peril of criminal prosecution in recording every item of outlay, appellants cite the following cases:

United States v. *Cohen Grocery Co.*, 255 U. S. 81;

Tedrow v. *Lewis & Son Co.*, 255 U. S. 98;

Small Co. v. *American Sugar Refining Co.*, 267 U. S. 233;

Connally v. *General Construction Co.*, 269 U. S. 385;

Cline v. *Frink Dairy Co.*, 274 U. S. 445.

None of the foregoing cases is applicable to the suit at bar.

In the first three cases cited, the Lever Act, which made it an offense against the United States, punishable by fine or imprisonment, "to make an

unjust or unreasonable rate or charge in handling or dealing in or with any necessaries", was under attack.

The fourth case cited involved a state law which made it a crime to pay, "less than the current rate of per diem wages in the locality in which the work was performed."

In the fifth case cited, the court examined a state law which covered different sorts of conspiracies and combinations in restraint of trade, employing terms which the court said, "sufficiently describes for purposes of a criminal statute the acts which it intends to punish" (pp. 455–6).

Congress has the power to delegate to the Federal Communications Commission the authority to prescribe the uniform systems of accounts and the exercise of that power is not an unlawful delegation of the legislative function. See *Interstate Commerce Commission* v. *Goodrich Transit Company, supra,* at pp. 214–5; *Kansas City So. Ry.* v. *United States,* 231 U. S. 423, 443.

The Communications Act of 1934, like the Interstate Commerce Act, created a commission as a legislative agency authorized to determine what is reasonable or unreasonable with respect to the regulation of carriers; and a carrier subject to the regulation of the Federal Communications Commission may and can, in every instance, know in advance what is required in any case long before criminal prosecution may or can be lodged in any court.

Section 220 (a) of the Communications Act of 1934 is derived from Section 20 (5) of the Interstate Commerce Act and the Supreme Court, referring to that section in *Kansas City So. Ry. Co.* v. *United States,* 231 U. S. 423, 443, said:

> * * * it amounts after all to no more than laying down the general rules of action under which the Commission shall proceed, and leaving it to the Commission to apply those rules to particular situations and circumstances by the establishment and enforcement of administrative regulations.

The proposition that instruction 2 (B. 1) is arbitrary and void under the *due process clause* is untenable. That is certain which is capable of being rendered certain.

Instruction 9 of the Uniform System of Accounts provides (R. 104):

> To the end that uniformity of accounting may be maintained, the company shall submit all questions of doubtful interpretation of the prescribed accounting to this Commission for consideration and decision.

See also Section 220 (g) of the Communications Act of 1934, under which the Commission may approve accounts with the same authority as it prescribes them under Section 220 (a).

The trial court, discussing instruction 2 (B. 1), in its opinion, said:

> The information this requirement makes available is essential to any determination

> of reasonable rates within 201 (b) of the Act * * * (R. 570).
>
> * * * telephone companies need incur no risk since those occasional cases which may be doubtful can be submitted for approval under Sec. 220 (g) of the act and instruction 9 of the order * * * (R. 571).
>
> The necessity of this order becomes apparent upon consideration of the interrelations of telephone companies. License agreements between subsidiaries can furnish examples of charges clearly not "just and reasonable." Yet any exact definition would be objectionable as arbitrary (R. 571).

The District Court did *not* err in holding said instruction valid.

IV

ORDER NO. 7–C OF THE TELEPHONE DIVISION OF THE FEDERAL COMMUNICATIONS COMMISSION DOES *Not*, WITH RESPECT TO INVESTMENTS IN ITEMS OF PROPERTY TO BE ENTERED RESPECTIVELY IN ACCOUNTS 100.1, 100.3, AND 103, LAY DOWN RULES OF ACCOUNTING SO VAGUE AND INDEFINITE AS NOT TO CONSTITUTE A LEGAL STANDARD OF CONDUCT UNDER APPLICABLE PROVISIONS OF LAW, AND THE REFERABLE INSTRUCTIONS IN SAID ORDER ARE *Not* ARBITRARY, AND THEY DO *Not* DEPRIVE THE APPELLANTS OF THEIR RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

The provisions of the system of accounts complained of by the appellants, whether directly or indirectly, are as follows:

> 100.1. *Telephone plant in service.*—This account shall include the original cost (note instruction 3–S.1) of the company's property used in telephone service at the date of the balance-sheet as classified under accounts 201 to 277, inclusive. (Note also instructions 3–AA, 20, and 21.) (R. 122–3.)
>
> 100.3. *Property held for future telephone use.*—(A) This account shall include the original cost (note instruction 3–S.1) of

property owned and held for imminent use in telephone service under a definite plan for such use.

(B) The property included in this account shall be classified according to the primary accounts for telephone plant in service. Separate subaccounts shall be provided for this purpose which accounts shall carry the same numbers as the plant accounts except that each account shall be prefixed by (1). (Note also instructions 20 and 21.) (R. 123.)

103. *Miscellaneous physical property.*—This account shall include the company's investment in physical property other than property the investment in which is includible in accounts 100.1, "Telephone plant in service", 100.2, "Telephone plant under construction", and 100.3, "Property held for future telephone use." It shall include the company's investment in telephone property retired (note instruction 3–T) and held for sale; also property such as lighting, water, power, and manufacturing plants, not held incident to the company's telephone operations, and assessments against miscellaneous physical property for the construction of public improvements (R. 125).

3. *Definitions.*—When used in this system of accounts:

* * * * *

(O) "Miscellaneous physical property" means all physical property owned by the company, other than telephone property the

investment in which is includible in accounts 100.1, "Telephone plant in service", 100.2, "Telephone plant under construction", and 100.3, "Property held for future telephone use."

* * * * *

(BB) "Telephone plant" means physical property used in telephone service (R. 99–102).

Argument of appellants and additional appellants, under this point upon which they rely, goes primarily to the use of the word "imminent" in the text of account 100.3 (quoted above) and to the classification of "spare plant."

Unless the use of property in telephone service is "imminent", as that word is used and understood by public utility accountants and regulatory authorities, charges for depreciation, taxes, and maintenance applicable to such property should not be included in net operating income nor should the original cost of the property be included in account 100.3.

The word "imminent" and the term "imminence of use", and what is meant thereby in the public utility field, appear repeatedly in decisions of the Interstate Commerce Commission. See "Statement of Methods", *Texas Midland* case, 75 I. C. C. 1, 162. See also *Chicago, B. & Q. R. Co.*, 134 I. C. C. 1, 38; *Virginian Ry. Co.*, 141 I. C. C. 595, 634; *Chicago and I. W. R.*, 149 I. C. C. 219, 225; *Pennsylvania R. Co.*, 22 Val. Rep. 1, 119; *Pitts-*

burgh C. C. & St. L. Ry. Co., 24 Val. Rep. 1, 54; *New York Central R. Co.*, 27 Val. Rep. 1, 48.

With respect to spare plant, appellants allege at pages 44 to 48 of their brief that the system is vague as to property to be classified under account 100.1, "Telephone plant in service", and then cite instances of switchboards consisting of large sections some of which often are unused; underground conduit consisting of a number of ducts only a part of which initially contain cables; the cables themselves consisting of many pairs of fine wires some of which are spares; and buildings initially containing vacant floor space. Appellants also criticise the statement of the Commission's Chief Accountant in his affidavit (R. 481) that only necessary spare plant is to be included in account 100.1.

It appears that the word "used", as ordinarily applied in public utility accounting is so universally understood that no justification exists for the narrow interpretation which appellants choose to place on the language of the texts of the accounts of this Commission's system, or of the broad unlimited interpretation which they themselves would make.

The classification of spare plant, under this Commission's system, was discussed by representatives of the Federal Communications Commission and of the carriers at a conference held on May 16, 1935, preliminary to promulgating Telephone Division Order No. 7–C. The Commission's interpretation of the provisions of the

Uniform System of Accounts relating to the classification of spare plant, explained to the carriers at that conference, was expressed in the affidavit of Mr. W. J. Norfleet, in the following language (R. 481):

> It is my opinion and understanding that this Commission's system of accounts permits the recording of necessary "stand-by" plant in Account 100.1, "Telephone plant in service" and that periodical transfers between said Account 100.1 and Account 100.3, "Property held for future telephone use" will not be required by reason of seasonable changes or fluctuating demands for plaintiffs' services. It is also my understanding that such interpretation was discussed and made clear at the conference between representatives of this Commission and representatives of plaintiffs and other telephone companies relating to the then proposed system of accounts for telephone companies, on May 16, 1935.

Both appellants and additional appellants must be aware that regulatory bodies rarely question the distinctions made by carriers between items entered in accounts such as 100.1, 100.3, and 103 until they have occasion to inspect the carrier's books of account and underlying data and that it is customary to accept reasonable efforts of corporate officials toward differentiation under a broad rule that has been promulgated where a rigid rule is not feasible. In the *Texas Midland*

case, previously referred to (75 I. C. C. 1, 162), the Interstate Commerce Commission, in discussing the "imminence-of-use rule", said:

> * * * If the carrier asserts that the lands were purchased in good faith, believing that they would be required for carrier purposes, the presumption will be in favor of the carrier, but nevertheless the carrier must be prepared to state the reason upon which its belief is founded and if the reason is found untenable the land is classified as noncarrier. Again * * * The judgment of the carrier is usually accepted. * * *.

There is in the Uniform System of Accounts nothing arbitrary, indefinite, unnecessary, or vague. Order No. 7–C under attack is, under the rule of statutory construction, to be sustained in all of its parts when the language of any account or instruction is alleged to be subject to different interpretations, one of which would make the account or instruction invalid and the other of which would sustain it. See *Arkansas Natural Gas Company* v. *Arkansas Railroad Commission,* 261 U. S. 379, 383–4; *New York C. & H. R. Co.* v. *United States,* 212 U. S. 481; *Knights Templars' and Masons' Life Indemnity Company* v. *Jarman,* 187 U. S. 197; *Houston & T. C. R. Co.* v. *Texas,* 177 U. S. 66.

See testimony of affiants (1) William J. Norfleet, (R. 480–481, figures 1–6); (2) Robert S. Rains,

(R. 491, figures 20–22); (3) John H. Bickley, (R. 508–510, and R. 521–522, figures 18–21); (4) Asel R. Colbert, (R. 528–529); and (5) Malcolm F. Orton, (R. 537–538, and R. 538, letter A.).

The District Court did *not* err in holding said provisions valid.

V

The Provisions of Order No. 7–C of the Telephone Division of the Federal Communications Comission, Challenged by the Appellants, *are* Separable from the Other Provisions of the Order, and the Order, as a Whole, Is *Not* Void Because of Any Illegality of Any of Its Provisions

The court below held (R. 581–2) that the failure of Telephone Division Order No. 7–C to make specific provision for depreciation of the classes of depreciable property, the *original cost* of which is included in account 100.3, "Property held for future telephone use", was unjustifiable; and condemned the provisions of paragraph (3) of provision (B), under instruction 21 (R. 108–9), relating to the accounting for contributions made to predecessor utilities for construction and acquisition of telephone plant subsequently acquired by appellants.

With respect to accounting requirement for depreciation of property held for future use, it is the duty of the Commission alone to supply the remedy for the discrepancy if there be anything lacking under the ruling of the court.

Instruction 21 (B) (3), condemned by the trial court, can be lifted bodily from the system and the completeness of the system will remain unimpaired.

Section 220 (a) of the Communications Act of 1934 covers accounts, records, and memoranda;

and the system under consideration extends to "original entries" or to books "of evidential character", as did the system upheld in the *Kansas City Southern* case, *supra,* and the system requires the carriers to keep records of particulars and books of general entries. (See instruction 2 (R. 97).) Surely such provisions should not be annulled.

The Uniform System of Accounts contains many accounts and instructions preceding the accounts and appearing as directions under the accounts, as, for instance, provisions (B) and (C), stated under account 100.4, "Telephone plant acquisition adjustment" (R. 123–4), and (B), stated under account 100.3, "Property held for future telephone use" (R. 123). Many of the instructions passed unattacked in the suit.

Under the law, the Federal Communications Commission itself is empowered to construe and apply its system of accounts, but if the court exercises jurisdiction invoked for the suppression of any of the accounts prescribed by the system, then the court no doubt will look to the provisions of the system, which are in writing, to determine what each provision means and what the relation of any provision is to all other provisions of the system. If the question of the separability of the system of accounts is a mixed question of law and fact, then it should be noticed that, as said in *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio,* 294 U. S. 63, 70, "this court does not sit as a board of revision with power to review the action of admin-

istrative agencies upon grounds unrelated to the maintenance of constitutional immunities"; and it should also be noticed that the Commission's affiants testified that the system is separable. See affidavits of Messrs. Norfleet (R. 483–484, VII), Rains (R. 492, figure 25), and Orton (R. 542. figure 8).

Neither the law controlling different coordinate branches of government nor that comity which ought to and does exist between the branches of government countenances the suggestion of appellants that because of their attack upon a few provisions of the accounting system the entire system should be enjoined, set aside, annulled, suspended, and thus wholly obliterated.

The District Court did *not* err in holding such provisions to be separable.

CONCLUSION

The presumption is that the decision of the trial court is correct on the Statement of Points (R. 600); and the burden is on the appellants to sustain their points. That burden has not been discharged either in part or in whole; and the decision of the trial court should be affirmed.

Respectfully submitted,

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